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No. 142

In the Supreme Court of the United States

OCTOBER TERM, 1944

LELAND H. CAMERON, PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the circuit court of appeals (R. 34–39) is reported in 140 F. (2d) 482. The orders of the Board may be found at R. 1–3.

JURISDICTION

The judgment of the circuit court of appeals (R. 40) was entered on February 4, 1944. A petition for rehearing was denied on March 14, 1944 (R. 40). The petition for a writ of certiorari was filed on June 8, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of

the Judicial Code, as amended by the Act of February 13, 1925, and under Section 1006 (f) of the Civil Aeronautics Act.

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board may temporarily suspend the civilian flying certificate of an Army pilot flying an Army plane who, without specific authorization or directions from his superior officers, violated the Board's Civil Air Regulations which are substantively identical with cognate provisions of the Army Air Forces Flying Regulations.

2. Whether the Board's finding that petitioner had violated the Civil Air Regulations was supported by substantial evidence.

3. Whether petitioner, who waived his right to a hearing before the Civil Aeronautics Board and did not seek a hearing or reconsideration of the Board's order after its entry, may raise, on judicial review of that order, questions not presented to the Board.

STATUTE AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions are set forth in the Appendices, pp. 19–27, *infra*.

STATEMENT

Petitioner seeks review of a judgment of the circuit court of appeals (R. 34–39) which affirmed an order of the Civil Aeronautics Board restrict-

ing for a period of 30 days the use of petitioner's air-line transport pilot certificate (R. 1–3).

On February 23, 1943, the Civil Aeronautics Administration filed a complaint with the Civil Aeronautics Board, charging that petitioner, the "holder of [an] airline transport pilot certificate", had on January 20, 1943, violated Sections 60.700 and 60.3503 of the Civil Air Regulations (Appendix B, pp. 23–24, *infra*) (1) by piloting "an Army B-25 aircraft * * * acrobatically over and/or within 1,000 feet horizontally of the Indianapolis, Indiana, Municipal Airport, in that he performed a dive followed by a steep climbing turn over buildings located on said airport" and (2) in executing the maneuver, by descending "to an altitude of lower than 500 feet above the ground" (R. 32–33).[1] This complaint was based upon reports charging such violations, filed with the Civil Aeronautics Administrator by a trained inspector and the Chief Airport Traffic Controller of the Indianapolis Airport, both of whom were representatives of the Civil Aeronautics Administration (R. 27–30). Petitioner was served with a copy of the complaint and at the same time was notified that he was "entitled to have a hearing concerning the charges contained" therein (R. 31).[2]

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[1] The complaint also alleged other violations (R. 32–33) which were subsequently withdrawn (R. 3).

[2] The Civil Aeronautics Act of 1938 forbids any person to serve in any capacity as an airman in connection "with any

A hearing was scheduled before a representative of the Board at Indianapolis on April 24, 1943 (R. 16). On March 30, 1943, the Board received a letter from Colonel Yeager, Air Corps Director of Wright Field, Dayton, Ohio, in which he stated that petitioner was engaged in experimental work

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civil aircraft used in air commerce" without an appropriate certificate "authorizing him to serve" in such capacity (sec. 610 (a) (2)) and empowers the Administrator "to issue airman certificates specifying the capacity in which the holders thereof are authorized to serve as airmen in connection with aircraft" (sec. 602 (a)). The Board, "after investigation, and upon notice and hearing," may "alter, amend, modify, or suspend, in whole or in part, any type certificate" if "the interest of the public so requires" or "revoke, in whole or in part, any such certificate for any cause which, at the time of revocation, would justify the Administrator * * * in refusing to issue to the holder of such certificate a like certificate" (sec. 609). Provision is also made (*ibid.*) for a limited temporary suspension of a certificate in cases of emergency "without regard to any requirement as to notice and hearing." See Appendix A, pp. 19–21, *infra*.

Under Reorganization Plans III and IV (5 U. S. C. §§ 133t–u), issued under the authority of the Reorganization Act of 1939, the function of administering safety regulations under the Civil Aeronautics Act has been divided between the Administrator of Civil Aeronautics and a five-member Civil Aeronautics Board. The Administrator is charged with the issuance of airman, aircraft, and air carrier certificates, the emergency suspension of certificates, the enforcement of safety rules and regulations, the investigation of violations of such rules and regulations, and the compromising of civil penalties for violations of the safety rules and regulations. The Board prescribes safety standards, rules, and regulations, and suspends and revokes certificates after hearing. See Final Report of the Attorney General's Committee on Administrative Procedure (1941), 175, 303–305.

necessitating "deviation from standard flying procedure" and that petitioner's alleged violations "were due to an unavoidable misunderstanding" (R. 21). The Board thereupon requested Colonel Yeager's presence at the hearing (R. 20). The hearing was convened on April 24 but was continued to May 14, 1943, at the request of petitioner's attorney because of the attorney's sudden illness (R. 16). Before this hearing could be held, petitioner, on May 13, 1943, personally waived his right to a hearing (R. 17). However, on May 14, 1943, petitioner's attorney requested that the waiver be set aside and the matter set down for hearing (R. 18–19). The Board promptly ordered a new hearing for June 4, 1943 (R. 14, 15), but petitioner again waived in writing his right to a hearing and requested that his case be presented to the Board in the usual manner followed when no formal hearing is held (R. 4–5, 9–10).[3] The Board then notified Colonel Yeager that the hearing had been cancelled (R. 14), and at petitioner's request delayed its consideration of this matter to permit petitioner to submit additional evidence (R. 4–5). Petitioner then filed with the Board a denial of the charges (R. 9–13)

[3] Section 97.16 of the Board's Rules of Practice Governing Suspension and Revocation Proceedings provides: "Where hearing has been waived by respondent, the Board shall make its decision on the basis of whatever data is submitted to it by the complainant and the respondent." 14 C. F. R. (Cum. Supp. 1943) 97.16.

and various letters in support of his denial (R. 3–4, 13, 24). On October 29, 1943, the Board found, after "due consideration of all the evidence of record", that petitioner had committed two violations of the Civil Air Regulations charged in the complaint filed by the Civil Aeronautics Administration and accordingly ordered, in the "public interest" (see sec. 609), that petitioner's air-line transport pilot license be "restricted for a period of 30 days", during which time petitioner "shall be permitted to pilot aircraft only while engaged in experimental work directly under the orders and control of the War Department" (R. 1, 3).

Petitioner then sought review of this order in the court below, contending (1) that he was immune from civil disciplinary action by the Board since the alleged violations of the Board's rules were committed while he was flying for the Army, under Army control and pursuant to Army requirements and instructions, and (2) that the findings of the Board were not supported by substantial evidence. The court below rejected these contentions, finding that the record before the Board supported the Administrator's charges; that although petitioner "was acting under Army orders and was flying an Army plane," his orders "on this flight" were "to fly according to contact flight rules in accordance with Civil Air Regulations"; that there "is no conflict between the

Civil Air Regulations and the Army orders or Army flight instructions"; and that "nowhere in the evidence submitted by petitioner is it stated or shown that any such act [charged as a violation] was demanded by Army instructions" (R. 38). The court subsequently denied a petition for a rehearing (R. 40).

ARGUMENT

Petitioner contends here, as he did below, that the Board's order of temporary suspension is invalid (1) because petitioner's alleged violations of the Civil Air Traffic Rules—the grounds for the suspension order—were authorized and required by Army orders relating to the flight upon which he was engaged (Pet. 10–15), and (2) because the finding of violation was not based upon substantial evidence (Pet. 15–25). We submit that the court below properly rejected these contentions and affirmed the Board's orders.

1. At the outset, there is serious doubt whether petitioner is entitled to raise these objections here or in the court below, since they were at no time placed before the Board. Section 1006 (e) of the Civil Aeronautics Act provides in part that—

> No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless

there were reasonable grounds for failure to do so.

The purpose of such a provision is of course to afford to the administrative agency "an opportunity to consider on the merits questions to be urged upon review of its order" (*Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253, 256), and thus "an opportunity to correct its errors, when attention is properly called thereto." *Mallory Coal Co.* v. *National Bituminous Coal Commission,* 99 F. (2d) 399, 407 (App. D. C.); see also *American Power and Light Co.* v. *Securities and Exchange Commission,* 141 F. (2d) 606 (C. C. A. 1); *Todd* v. *Securities and Exchange Commission,* 137 F. (2d) 475 (C. C. A. 6). Such an opportunity was never extended to the Board in this case.

Petitioner was served with a copy of the complaint which the Civil Aeronautics Administrator had filed with the Board and was informed that he was "entitled to have a hearing concerning the charges contained in the complaint, at which [he] may be represented by counsel, cross-examine witnesses called by the Administrator, and present evidence in [his] behalf" (R. 31). However, petitioner waived his right to a hearing and at no time requested access to the basis for the charges, *viz.,* the two reports of petitioner's offending conduct on his January 20, 1943, flight, which were at all times available and open to inspection by petitioner or his attorney. After the Board had en-

tered its order on October 29, 1943, suspending petitioner's license for 30 days commencing November 9, 1943,[4] petitioner did not move the Board for reconsideration of its order or for a hearing, as is frequently the practice where a hearing has been waived.[5]

Consequently, petitioner at no time presented to the Board his contentions, made in the court below for the first time and renewed in his petition here, that the Board's findings of violations of the Civil Air Traffic Regulations lacked substantial evidence (Pet. 15–25)[6] and that the Army flying regulations which bound petitioner during the flight in question required the violation of the Civil Air Traffic Regulations (Pet. 10–15).[7] To let

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[4] The 30-day period of restriction was to run ten days from the date of the order (R. 3) and was thus to begin on November 9, 1943 (R. 1).

[5] Section 285.8 of the Board's Rules of Practice provides in part: "Any party may petition for rehearing, reargument, or reconsideration of any final order by the Board in a proceeding, or for further hearing before decision by the Board." 14 C. F. R. (Cum. Supp., 1943), Sec. 285.8. While these rules relate to "economic proceedings" (rate orders and the like), the Board always entertains a motion for reconsideration of its order, and if a hearing has been waived, would often grant a hearing on request. See, e. g., *Robert Rybolt*, Civil Aeronautics Board Docket No. S. R. 344; *Joseph M. Miklas*, Civil Aeronautics Board Docket No. S. R. 809.

[6] This contention is rested on the allegations that of the two investigators upon whose report the findings are based, one was not an eyewitness and the other had made unfounded statements (Pet. 15–25).

[7] On June 18, 1943, petitioner's attorney, by letter, raised before the Board the question as to whether petitioner's

petitioner attack the Board's order in the courts on grounds which, if submitted administratively and found to be meritorious, might have induced the Board either to supply the alleged deficiency in evidence or to modify its order, would make available a "tactic" with which "to ambush" an administrative agency. *Transamerican Freight Lines, Inc.* v. *United States,* 51 F. Supp. 405, 412, fn. 10 (D. Del.). Such a failure to utilize available administrative remedies stands as a barrier to the consideration of the new issues by an appellate court. *Mallory Coal Co.* v. *National Bituminous Coal Commission,* 99 F. (2d) 399, 407 (App. D. C.).

2. Petitioner assails the Board's order on the ground that he "was acting under army orders" and therefore "not subject to discipline by the Civil Aeronautics Board" (Pet. 10). There is, however, no question here of a conflict between military and civil regulations, for there is nothing in the record to indicate that petitioner was directed or required by military rules or orders to fly in such a manner as to violate the Air Traffic Rules of the Civil Aeronautics Board. On

"civilian license * * * or his conduct as a civilian airline pilot" could "be jeopardized or put in question when he is flying an Army B–25 bomber under the direction and control and pursuant to the orders of the Army" (R. 7). However, petitioner at no time contended before the Board, as he now contends in this Court, that the "army instructions and practices", as regards the flight in question, "necessitated deviation from the standard procedure" (Pet. 15) and from "civil standards" (Pet. 11).

the contrary, as the court below correctly held, "on this flight" petitioner's "Army orders were to fly according to contact flight rules in accordance with Civil Air Regulations," and there is "no conflict" between these regulations and the Army orders and flight instructions (R. 38).

Section 60.3503 of the Civil Air Traffic Rules, which petitioner was found to have violated, provides that "exclusive of taking off from or landing upon an airport or other landing area aircraft shall not be flown below the * * * minimum safe altitude of flight [of] 500 feet above the ground * * * or within 500 feet from any * * * obstruction to flight." See Appendix B, pp. 23–24, *infra*. These restrictions do not apply to "public aircraft previously authorized by the appropriate governmental agency, to make specific flights below such minimums in the public interest" (sec. 60.3503). There is not only absent any contention or indication here that such authorization was given, but the record shows the contrary, since petitioner had made the flight in question pursuant to directions from the Army authorities to proceed to his destination, the Indianapolis airport, "at CFR (Altitude)" (R. 8–9).[8] The abbreviation "CFR" denotes the "Contact Flight Rules" of the Civil

[8] This appears from the Departure and Arrival Report, a record of the clearance and arrival of the flight in question. The report is seemingly erroneously dated January 20, 1942 (R. 8–9). The actual date of the flight in question was January 20, 1943 (R. 2, 3–4, 5, 10, 13, 21, 29, 35).

Aeronautics Board and of the Army Air Forces,[9] and these regulations are substantially the same in regard to the minimum required altitude, for the Army Air Forces regulations in effect at that time (par. 16, Army Air Forces Reg. 60–16, September 9, 1942) likewise prohibit flights below 500 feet except during take-off and landing, or "within 500 feet of any obstruction to flight" (see Appendix B, pp. 26–27, *infra*).[10] The same situation exists in respect of Section 60.700 of the Civil Air Traffic Rules which petitioner was also found to have violated by performing acrobatics "within 1,000 feet" of the Indianapolis airport (R. 2). That regulation prohibits acrobatic flying within 1,000 feet of "any airport or landing area," and the corresponding Army Air Forces regulations (par. 10), as the Acting Air Judge Advocate points out (Appendix C, p. 28, *infra*), are even more "stringent in that they flatly prohibit acrobatics within 10 miles of an airport or airway" (see Appendix B, pp. 25–26, *infra*). In the

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[9] See Section 60.4 of the Air Traffic Rules of the Civil Aeronautics Board (14 C. F. R. 60.4), and Army Air Forces Regulation No. 60–16, September 9, 1942 (Appendix B, pp. 24, 26, *infra*.)

[10] The Army Air Forces Regulations permit "any maneuver" to be "conducted at such altitude * * * as is necessary for its proper execution * * * when such maneuver is required to accomplish an ordered tactical flight, engineering or training mission" (par. 16b; see Appendix B, pp. 26–27, *infra*). There is no contention or showing that petitioner was conducting a maneuver within the scope of this provision.

opinion of the Acting Air Judge Advocate of Headquarters, Army Air Forces, there is "no conflict whatever" between the Army Air Forces flying regulations and the Air Traffic Rules of the Civil Aeronautics Authority pertinent to this case (see Appendix C, p. 28, *infra*).

Nothing in the record supports petitioner's contention that the violations of the air-traffic rules occurred in obedience to military orders or instructions. The letter from Colonel Yeager, of Wright Field, stating that petitioner's "flights were of an experimental nature necessitating deviation from the standard procedure" (R. 21; Pet. 10), and the letter from Lieutenant Perper, stating that the flight "demanded flying of an unusual nature" (R. 13; Pet. 10), were properly characterized by the court below as "pure generalizations" since there was "nothing to show that Cameron [the petitioner] was authorized or ordered to depart from standard practice in this instance" (R. 38). Indeed, so far from requiring deviation from standard flying procedures, the Departure and Arrival Report of the flight, which petitioner signed, specifically states that the "pilot is familiar with local flight rules and regulations and those of the Civil Aeronautics Administration" (R. 9).[11] The Acting Air Judge Advocate of the

[11] Petitioner claimed below that he was unable "to complete two-way radio communication with the Indianapolis tower" and accordingly "proceeded, in accordance with standard army practice, of flying close to the control tower

Army Air Forces advises us that a dive or "buzzing within 50 feet of a control tower would find no excuse either in the fact that the flight was a test mission or in the fact that radio contact with the tower relative to a normal approach was delayed" (see Appendix C, p. 29, *infra*), but the civil infractions involved would not be excused even if they involved no violation of military law.[12] The lower court correctly ruled that petitioner's violations of the civil air rules were not required by military orders or regulations. The suspension order of the Civil Aeronautics Board places no restrictions upon the continued flying by petitioner for the military.[13] In the absence of any conflict between military orders and civil obligations, it is well established that a member of the military receives no immunity from his civil obligations or from the jurisdiction of civil authority over his offenses against civil laws. *Franklin* v. *United States,* 216 U. S. 559; *Caldwell* v. *Parker,* 252 U. S. 376; *Neall* v. *United*

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so as to attract the attention of the control tower operator" (R. 10; Pet. 11). However, this does not mean petitioner was required by Army order to fly in this manner.

[12] An acquittal before a court martial cannot be pleaded as a defense for the commission of the same act in a court of civil jurisdiction. *United States* v. *Cashiel,* 25 Fed. Cas. No. 14744, p. 318 (D. Md.); *In re Fair,* 100 Fed. 149, 151 (C. C. D. Neb.).

[13] The Board's suspension order specifically permits petitioner to continue flying "under the orders and control of the War Department" (R. 1). Cf. *Ex Parte Schlaffer,* 154 Fed. 921 (S. D. Fla.).

States, 118 Fed. 699 (C. C. A. 9); *United States* v. *Hirsch,* 254 Fed. 109 (E. D. N. Y.); *Stewart* v. *Commonwealth,* 185 Ky. 34, 213 S. W. 185; *State* v. *Sparks,* 27 Tex. 627, 632; *Winthrop's Military Law and Precedents,* 8d Ed. (Reprint, 1920) 877–878.[14]

3. While recognizing (Pet. 22) that the Board "like other expert agencies dealing with specialized fields * * * has the function of appraising conflicting and circumstantial evidence, and the weight and credibility of testimony" (*National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584, 597), petitioner contends that the court below erred in holding that there was substantial evidence to support the Board's finding (Pet. 15–25). The record clearly reveals a sub-

[14] That the acts found by the Board to constitute violations of its flying regulations were committed while petitioner was not exercising his rights as a holder of his air-line transport pilot's certificate does not affect the Board's power to suspend the certificate. Section 609 of the Act (Appendix A, p. 20, *infra*) empowers the Board, "after investigation, and upon notice and hearing" to suspend a pilot's certificate if "the interest of the public so requires" or "for any cause which, at the time of revocation, would justify the Administrator * * * in refusing to issue to the holder of such certificate a like certificate." The Board has refused to issue pilot certificates to reckless automobile drivers. See, *e. g.,* *Dunbar-Airman Certificate*, Civil Aeronautics Board Docket No. SR–32, January 16, 1940, 1 C. A. A. R. 525. The broad discretionary powers vested in the Board by Section 609 clearly authorize taking into account, in a disciplinary action, any acts of the accused having a reasonable bearing upon his ability to exercise competently his flying privileges without undue danger to others.

stantial basis for the administrative finding. The report of Luther E. Dillon, Chief Airport Traffic Controller of the Indianapolis Airport, states that petitioner's plane "entered the Indianapolis Contral Zone * * * and made a low approach from west to east barely missing the [control] tower" (R. 30). The report of Henry M. Hamilton, a civil aeronautics inspector who "personally observed" (R. 29) the maneuvers of petitioner, states that petitioner dived his aircraft "across airport, ninety degrees to incoming traffic, at a very low altitude, pulling aircraft up to a very steep climb, approximately 50 feet from control tower"; that no "prior approval" was requested by petitioner, "and no approval [was] granted by control tower operator"; and that such "conduct in flight" is "dangerous and very unnecessary" (R. 28–29).

Petitioner attacks the Dillon report on the ground that it is "not of a witness" (Pet. 16). While it is not designated as the report of an eyewitness, the court below properly observed that "it is in the form customarily used by one who is an eyewitness", whose duty as "a qualified chief airport traffic controller" is "to make accurate observations of maneuvering airplanes" (R. 35). Petitioner seeks to discredit Hamilton's credibility on the ground that the Administrator withdrew other charges against petitioner contained in the Hamilton report after determining, upon investigation, that there was not sufficient evi-

dence to support such charges (Pet. 16–17, 19–20). But such administrative action serves to reinforce the accuracy of the remaining charges, which the Administrator did not withdraw but after investigation found to be sustained. In any event, petitioner's attack upon these reports does not go to the propriety of their admissibility before the Board but is directed solely to their weight and credibility.[15] Since it is the function of the Board to appraise conflicting testimony and to appraise its weight and credibility, the court below properly refused to substitute its judgment for that of the Board. *National Labor Relations Board* v. *Link-Belt Company,* 311 U. S. 584; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146; *Swayne and Hoyt* v. *United States,* 300 U. S. 297, 304.[16]

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[15] The evidence submitted by petitioner before the Board, *viz.*, letters from Lieutenant Perper and Squadron Leader Falk (R. 3–4, 13), does not contradict the specific charges of violation made by the Administrator but, as the court below observed, consisted merely of statements "framed in general terms indicating that Cameron [the petitioner] is a careful flier" (R. 36).

[16] Petitioner urges that the "rule as to finality in the weight and credibility of testimony is not as controlling here as in a case where witnesses were heard" (Pet. 24). This argument would mean that a person subject to discipline by an administrative tribunal would be in a better position by waiving a hearing than if a hearing were held. The effect of any such doctrine need not be elaborated. At any rate, this Court has applied the rule of administrative finality to determinations of administrative agencies such as the National Labor Relations Board (*e. g., National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584), a body that

CONCLUSION

The decision below is correct, and the case presents no question calling for further review. The suspension order of the Board does not burden or interfere with any military functions, whether of petitioner or anyone else. There is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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rarely hears witnesses or oral argument, its findings and decisions being based on reports of trial examiners who actually hear the case. See "National Labor Relations Board," the Attorney General's Committee on Administrative Procedure (1940), Monograph No. 18, pp. 34–72.